93-568

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ALLIED PRODUCTS CORPORATION,

Petitioner,

v.

RAYMOND RENKIEWICZ, personal representative of the estate of Eugene Renkiewicz, deceased, and JOSEPH and ETHEL L. NORTLEY, copersonal representatives of the estate of Mary Nortley Renkiewicz, deceased,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

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October 11, 1993

QUESTIONS PRESENTED

1. Whether the Michigan Court of Appeals erred in deciding that a Federal Bankruptcy Court could not authorize a sale of a debtor's assets free and clear of an unmatured claim.

2. Whether the Michigan Court of Appeals erred in deciding that a Federal Bankruptcy Court could not discharge a debtor from an unmatured claim.

3. Whether the plaintiffs' state court action is an impermissible collateral attack on a Federal Bankruptcy Court's order.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

Petitioner, Allied Products Corporation ("Allied Products")[1], seeks a writ of certiorari to review an opinion and order of the Michigan Court of Appeals which reversed an order of summary disposition granted by the trial court in favor of Allied Products.[2] Leave to appeal was denied by the Michigan Supreme Court.

1 Pursuant to Rule 29.1, Allied Products has no parent company and all of its subsidiaries are wholly owned.

2 The petitioner, Allied Products, was a defendant and appellee below. The other defendants in the action below, not petitioners here, are White Farm Equipment Company, Inc., Minneapolis-Moline, and the Board of County Road Commissioners for the County of Charlevoix.

OPINIONS BELOW

The order denying leave to appeal was entered by the Michigan Supreme Court on July 13, 1993 and is reprinted at Appendix C[3]. The October 19, 1992 opinion of the Michigan Court of Appeals is reported at 196 Mich. App. 309, 492 N.W. 2d 820 and is reprinted at App. A. The trial court's decision, per Charlevoix County Circuit Judge Richard M. Pajtas, dated October 8, 1990, is not reported and is reprinted at App. D.

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on October 19, 1992. App. A. A timely motion for rehearing was denied on January 4, 1993. App. B. Leave to appeal to the Michigan Supreme Court was denied on July 13, 1993. App. C. This petition for a writ of certiorari is being docketed in this Court within 90 days from the denial of leave to appeal below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTES AND CONSTITUTIONAL PROVISIONS

Article VI, clause 2 of the United States Constitution provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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[3] References to opinions and orders reprinted in the Appendix appear throughout the petition as "App.", followed by the relevant appendix page designations.

28 U.S.C. § 157 (1988), in pertinent part, provides as follows:

> (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.
>
> (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under Section 158 of this title.
>
> (2) Core proceedings include, but are not limited to-
>
> (M) orders approving the use or lease of property, including the use of cash collateral.

28 U.S.C. § 1257(a) (1988) provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any

commission held or authority exercised under, the United States.

28 U.S.C. § 1334 (1988) provides as follows:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Section 101(5) of the United States Bankruptcy Code (11 U.S.C. § 101(5) (1988)) provides as follows:

> "Claim" means--
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Section 105(a) of the United States Bankruptcy Code (11 U.S.C. § 105(a) (1988)) provides as follows:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 363 of United States Bankruptcy Code (11 U.S.C. §363 (1988)) in pertinent part, provides as follows:

> (b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.
>
> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if--
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Section 1141(d) of the United States Bankruptcy Code (11 U.S.C. § 1141(d) (1988)) provides as follows:

(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan --

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not --

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if -

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the court for relief under chapter 7 of this chapter.

STATEMENT OF THE CASE

This case involves a collateral state successor liability action brought against Allied Products, a purchaser of bankrupt assets, after a United States Bankruptcy Court ordered that Allied Products purchased the assets free and clear of all claims such as

the one involved here. The underlying action is a product liability suit concerning a 1973 Minneapolis-Moline tractor. Plaintiffs-Respondents filed suit against White Farm Equipment Company, Minneapolis-Moline, the Board of County Road Commissioners for the City of Charlevoix and Allied Products. Plaintiffs specifically alleged that Allied Products, which purchased some assets during White Farm Equipment Company's bankruptcy, was the successor corporation of White Farm Equipment Company ("White Farm") and, therefore, liable under Michigan law for any and all damages incurred as a result of the sale of products by White Farm.

In May 1985, a Chapter 7 involuntary bankruptcy petition was filed against White Farm in the United States Bankruptcy Court for the District of Kansas. App. f-3. In June 1985, venue was transferred to the United States Bankruptcy Court for the Northern District of Illinois and the case was subsequently converted into a Chapter 11 reorganization proceeding. App. f-3. In October 1985, White Farm entered into an asset acquisition agreement with Allied Products, subject to approval by the bankruptcy court. App. f-6. During that same month, the bankruptcy court entered an order approving the agreement and authorizing the sale. App. F. In that order, the bankruptcy court found that White Farm did not have sufficient capital, nor any reasonable likelihood of obtaining sufficient capital, to propose and consummate a Chapter 11 plan, absent a sale of its business and assets to a third party. App. f-7. The court further found that White Farm had not received any bona fide offers for the sale of its businesses or its assets which were worthy of consideration, other than the Allied Products' offer. App. f-7. Finally, the court observed that failure to approve the asset acquisition would result in White Farm filing a motion to convert its case to a Chapter 7 liquidation proceeding. App. f-8. The bankruptcy court concluded that there were compelling business reasons to authorize the sale and that approval of the

acquisition was in the best interests of White Farm, its creditors and other parties in interest. App. f-11.

In its October 1985 order, the bankruptcy court also made several important conclusions of law. App. f-9-12. First, it found that this asset acquisition was a core proceeding under 28 U.S.C. §157(b)(2)(M). App. f-9. Second, it possessed jurisdiction to authorize the sale pursuant to 28 U.S.C. §§1334(a), 1334(d) and 157(a). App. f-9. Third, specific statutory authority to approve the sale existed under 11 U.S.C. §§105(a), 363(b) and 363(f). App. f-9. Finally, Allied Products was a good faith purchaser under 11 U.S.C. § 363(m), and that the sale price was adequate under the circumstances. App. f-9-10.

The order approving Allied Products' acquisition specifically decreed that White Farm's assets would "immediately be transferred to Allied Products free and clear of all liens, claims, and encumbrances." App. f-12. The agreement, approved by the bankruptcy court, expressly and repeatedly disclaimed liability for any product liability claims. App. a-4-5. In fact, the purchase price of the White Farm assets acquired by Allied Products did not account for Allied Products assuming any liability for future unaccrued claims concerning White Farm products manufactured prior to October 9, 1985. The bankruptcy court retained jurisdiction to adjudicate, among other things, "all issues concerning liens, claims, encumbrances and alleged ownership interests with respect to the Reorganization Assets, including the extent, validity, enforceability, and priority of all such liens, claims, encumbrances and alleged ownership interests." App. f-11-13. The court also retained jurisdiction over disbursement of the "Excluded Cash Segregated Fund," a fund to be used "to, inter alia, satisfy (disburse funds equal to adjudicated value of such property interests) to the extent such liens, claims, encumbrances or alleged ownership interests are

held to be valid, enforceable, superior and paramount . . . ." App. f-13-14.

Subsequent to the authorization of the sale to Allied Products, the bankruptcy court confirmed a plan of reorganization between the official committee of unsecured creditors on November 11, 1987. App. a-3. The Chapter 11 proceeding is still pending and currently supervised by the United States Bankruptcy Court for the Northern District of Illinois under the caption In re White Farm (Civil Action No. 85 B 7532). App. a-3.

On December 15, 1987, the alleged accident occurred involving a 1973 Minneapolis-Moline tractor. App. a-3. On or about October 1989, plaintiffs filed their complaint against the defendants. App. a-4.

Relying on the bankruptcy court's prior orders, Allied Products moved for summary disposition, claiming no liability for the accident involving an allegedly defective tractor manufactured, distributed and sold by White Farm over ten years prior to the bankruptcy court authorized sale to Allied Products. The trial court granted Allied Products' motion, ruling that the 1985 Order of the United States Bankruptcy Court for the Northern District of Illinois, approving the sale of certain White Farm assets to Allied Products free and clear of claims concerning equipment manufactured prior to the sale date, barred any such future actions on such claims against Allied Products. App. D, E. The trial court held that the bankruptcy court's order preempted state law governing successor liability in situations involving an unaccrued future claim concerning a pre-October 1985 product. App. D. The Michigan Court of Appeals reversed. App. A. The court of appeals held, contrary to the findings of the bankruptcy court, that the bankruptcy court did not have jurisdiction to rule on related unmatured claims such as plaintiffs' product liability claim. Petitioner's timely motion for

rehearing was denied. App. B. Petitioner was also denied subsequent leave to appeal to the Michigan Supreme Court. App. C.[4]

REASONS FOR GRANTING THE WRIT

Summary Of Argument

In accordance with the plain language of the Bankruptcy Code, the United States Bankruptcy Court for the Northern District of Illinois properly exercised its jurisdiction and equitable powers in ordering that no liability could be imposed upon Allied Products for any product liability claim involving a White Farm product manufactured prior to October 9, 1985.

The Michigan Court of Appeals erred in framing the issue as whether the federal bankruptcy court had jurisdiction to discharge the debtor of an unmatured claim. The proper issue presented to the state court of appeals was whether the federal bankruptcy court had jurisdiction to authorize the sale of some White Farm assets to Allied Products free and clear of certain, limited unaccrued or unmatured claims. Assuming, arguendo, that the court of appeals properly framed the issue, the court erred in deciding that a federal bankruptcy court could not discharge a debtor from such a claim. It is clear, pursuant to the plain language of the Bankruptcy Code, a recent decision by this Court and numerous decisions by the federal courts, that a bankruptcy court has the jurisdiction to discharge a debtor from an unmatured claim.

Moreover, although the issue of whether a bankruptcy court is able to authorize a sale of assets free and clear of unmatured claims has polarized the federal courts of appeals, the clear weight of authority supports the bankruptcy court's ability

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[4] Justice Patricia Boyle would have heard the matters raised in this petition. App. c-2.

under the Bankruptcy Code to order a sale free and clear of such claims. Thus, the state court has decided an important and recurring question of federal bankruptcy law in conflict with the Bankruptcy Code and decisions by the federal courts of appeals.

The Supremacy Clause of Article VI of the United States Constitution empowers Congress to preempt state law. U.S. Const. Art. VI, Cl.2. Because plaintiffs' collateral state suit against Allied Products stands as an obstacle to the accomplishment and execution of the full objectives of Congress, as set forth in the United States Bankruptcy Code, plaintiffs' case clearly violates the Supremacy Clause. *See* Louisiana Public Service Comm'n v. F.C.C., 106 S.Ct. 1890 (1986). Plaintiffs' state law theory of successor liability based upon acquisition of a product line is simply inconsistent with more ancient federal bankruptcy principles based upon the sale of a debtor's assets to maximize the estate for the benefit of creditors. *See* In re Paris Industries Corp., 132 B.R. 504 (D. Me. 1991).

Once the United States Bankruptcy Court for the Northern District of Illinois entered its order, the jurisdiction of that court was established, except insofar as it could be attacked on direct appeal, or in the court of its rendition. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377 (1940); Stoll v. Gottlieb, 305 U.S. 165 (1938); In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992). The Bankruptcy Court for the Northern District of Illinois specifically retained jurisdiction of this matter, and the Chapter 11 reorganization case is still pending. App. a-3; f-13-14. Thus, the Michigan Court of Appeals' decision to allow a collateral attack on a bankruptcy court's prior order and jurisdiction is in conflict with federal law and prior decisions of this Court.

I. The Michigan Court of Appeals' Decision Conflicts with Numerous Federal Court Decisions Holding That A Bankruptcy Court Has Jurisdiction To Authorize Sales Free And Clear Of Unmatured Claims.

The state court of appeals below characterized the sale free and clear of claims to Allied Products as a "discharge". App. a-10. A "discharge" under 11 U.S.C. §1141(d) refers to the dischargeability of the debtor. At issue in this case is the liability of the purchaser, Allied Products. The state court's discussion of how the plaintiffs' claims arose after confirmation of the plan concerns whether the plaintiffs may proceed against the debtor, not whether the plaintiff should be allowed to disturb the court-approved acquisition agreement and prior bankruptcy court orders. The court of appeals mischaracterized the issue and, thus, erroneously decided a federal question that conflicts with decisions by the federal courts of appeals.

The overwhelming number of federal courts of appeals and district courts interpreting the Bankruptcy Code support the proposition that a bankruptcy court has jurisdiction to order the sale of a bankrupt's assets free and clear of unmatured claims. *Compare* MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.), 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); Conway v. White Trucks, a Division of White Motor Corp., 692 F. Supp. 442 (M.D. Pa. 1988), *aff'd*, 885 F.2d 90 (3d Cir. 1989); Wallace v. Dorsey Trailers, Southeast, Inc., 849 F.2d 341 (8th Cir. 1988); Volvo White Truck Corp. v. Chambersburg Beverage, Inc., (In re White Motor Credit Corp.), 75 B.R. 944 (Bankr. N.D. Ohio 1987) (federal bankruptcy law preempts state law imposing successor liability on purchaser of assets); Paris Mfg. Corp. v. Ace Hardware Corp. (In re Paris Industries Corp.), 132 B.R. 504 (D. Me. 1991) (same); *with* Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.), 730 F.2d 367 (5th Cir. 1984); Michigan Employment Security

Comm'n v. Wolverine Radio Co., Inc. (In re Wolverine Radio Co.), 930 F.2d 1132 (6th Cir. 1991), *cert. denied*, 112 S.Ct. 1605 (1992).

Section 363 of the United States Bankruptcy Code provides that a bankruptcy court may authorize the sale of a bankrupt debtor's assets. Subsection (f) of Section 363 of the Bankruptcy Code specifically empowers a bankruptcy court to approve a sale "free and clear" of all claims against the assets. This section authorizes sales free and clear of specific interests in the property being sold, such as liens. Although the courts of appeals are in conflict as to whether a bankruptcy court can authorize a sale of assets free and clear of unsecured or unmatured claims, the majority of federal courts interpret the Code to allow a bankruptcy court to authorize sales free and clear of such post-petition claims. *See, e.g.*, In re Paris Industries Corp., 132 B.R. 504 (D.Me. 1991); In re White Motor Credit Corp., 75 B.R. 944 (Bank. N.D. Ohio 1987).

Aside from the bankruptcy court's authority pursuant to Section 363 of the Bankruptcy Code to authorize sales free and clear of unmatured claims, a Sixth Circuit court relied upon the bankruptcy court's broad equitable powers under the Code to authorize a sale free and clear of a post-petition inquiry. The bankruptcy court in In re White Motor held that:

> [a]bsence of specific statutory authority to sell free and clear poses no impediment. This authority is implicit in the court's general equitable powers and its duty to distribute debtor's assets and determine controversies thereto. Van Huffel v. Harkelrode, 284 U.S. 225, 52 S.Ct. 115, 76 L. Ed. 256 (1931). Authority to conduct such sales is within the court's equitable powers when necessary to carry out the provisions of Title II. 11 U.S.C. §105(a).

In re White Motor Credit Corp., 75 B.R. 944, 948 (Bankr. N.D. Ohio 1987); *see* In re U.N.R. Industries Inc., 725 F.2d 1111, 1119 (7th Cir. 1984) (stating that equitable power of the bankruptcy court might be broad enough to make provision for future claims).

The United States District Court for the Middle District of Pennsylvania, affirmed by the Third Circuit Court of Appeals, followed the White Motor court's analysis. Conway v. White Trucks, a Div. of White Motor Corp., 692 F. Supp. 442, 455 (M.D. Pa. 1988), *aff'd.*, 885 F.2d 90 (3d Cir. 1989). Further, the Conway court did not find Mooney, supra, to be an obstacle: "... it appears the Mooney decision does not prohibit the Bankruptcy Court's use of its general equitable powers to channel claims and sell assets free and clear. 11 U.S.C. §105(a)".[5]

The Second Circuit Court of Appeals has also held that a bankruptcy court's power extends to channeling or confining claims which could otherwise be asserted against third parties to the debtor's estate. MacArthur Co. v. Johns - Manville Corp., 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988). Thus, in MacArthur, the Second Circuit allowed the bankruptcy court to sell assets free and clear where "Manville faced the possibility of

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5 A prominent bankruptcy scholar has agreed with the conclusions reached in Conway and White Motor that a bankruptcy court has authority to approve sales free and clear of post-petition claims. Professor David Gray Carlson argues that Section 11 U.S.C. § 363(f)(5) of the Bankruptcy Code should be read to permit the foreclosure of future claimants from proceeding against successor corporations where a fund is created to which the future plaintiffs' ratable share of cash proceeds would be paid. *See* David G. Carlson, *Successor Liability in Bankruptcy: Some Unifying Themes of Intertemporal Creditor Priorities Created by Running Covenants, Products Liability and Toxic Waste Cleanup*, 50 Law & Contemp. Probs. 119, 127-31 (Spring 1987). In so commenting, Professor Carlson also found support in the Third Circuit's decision in *In re Amatex Corp.*, 755 F.2d 1034 (3d Cir. 1985) (allowing class representative for future tort creditors without deciding that future tort creditors have "claims").

suits by tens of thousands of as yet unknown asbestos victims." 837 F.2d at 90.

The sale of assets to Allied Products provided for an Excluded Cash Segregated Fund. App. f-13-14. The bankruptcy court, which had jurisdiction over all "claims," may have had the authority to order claimants with unmatured claims, such as plaintiffs, to stand in line with other creditors to receive disbursements from such a segregated fund. App. f-13-14. Plaintiffs should not be permitted to interfere with the bankruptcy court's jurisdiction to estimate and provide for treatment of "claims" which are part of a core proceeding. Allied Products did not impair any claimant's remedies, but increased their ability to recover from the proper responsible party, the debtor. See In re Amatex Corp., 755 F.2d 1034, 1036 (3d Cir. 1985) (approving appointment of representative to assert interests of "future" tort claimants in Chapter 11 case); In re Johns-Manville Corp., 36 B.R. 743, 745-746 (Bankr. S.D.N.Y. 1984) (providing for future claimants through trust funds created under the plan).

The Eighth Circuit Court of Appeals in Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341 (8th Cir. 1988), addressed a situation on all fours with petitioner's own case. In Wallace, decedent's relatives brought, inter alia, a wrongful death action against the purchaser of a debtor's assets in bankruptcy, arising out of the decedent's alleged operation of an aerial lift manufactured by the debtor. The lift was manufactured in 1962. The relevant petition in bankruptcy was filed in 1979 and the assets sold to purchasers in 1979. Plaintiffs' decedent was not killed until 1984. In light of these facts, the Eighth Circuit held that, "The unequivocal disclaimer of liability, coupled with the explicit language of the bankruptcy court's order, make it clear that [the purchaser] did not expressly or impliedly assume any liabilities of [the manufacturer], either fixed or contingent." 849 F.2d at 343. The Court of Appeals affirmed summary judgment for the defendant.

As a matter of federal bankruptcy law, Allied Products acquired the assets purchased from White Farm free and clear of plaintiffs' claims. The Michigan Court of Appeals, however, failed to address Section 363 of the Bankruptcy Code, misinterpreted the plain language of Section 105(a) and ignored relevant decisions by the federal courts of appeals reaching a contrary result.

Moreover, the state court of appeals disregarded important overriding policy considerations under federal bankruptcy law. The protection federal bankruptcy law affords asset purchasers serves an important policy of improving the market of the assets of a bankrupt company, thus benefiting all creditors. This policy serves seller, purchaser, and potential claimant alike.

The sale of assets free and clear is appropriate in a bankruptcy proceeding since it allows the trustee to sell the assets at a fair price so that the debtor is not forced to compensate for potential liability:

> The effects of successor liability in the context of a corporate reorganization preclude its imposition. The successor liability specter would chill and deleteriously affect sales of corporate assets, forcing debtors to accept less on sales to compensate for this potential liability.

In re White Motor Credit Corp., 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987); *see* Forde v. Kee-Lox Mfg. Co., 437 F. Supp. 631 (W.D.N.Y. 1977), *aff'd on other grounds*, 584 F.2d 4 (2d Cir. 1978); American Living Systems v. Bonapfel (In re All-American of Ashburn, Inc.), 56 B.R. 186 (N.D. Ga. 1986), *aff'd on other grounds*, 805 F.2d 1515 (11th Cir. 1986); Rubinstein v. Alaska Pacific Consortium (In re New England Fish Co.), 19 B.R. 323

(Bankr. W.D. Wash. 1982). The imposition of successor liability, therefore, defeats the purpose of bankruptcy proceedings to grant debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

The trial court below specifically recognized, as did the bankruptcy court, the need for a sale free and clear of such claims to Allied Products:

> If a perspective [sic] purchaser can't go to a defunc [sic] company that's involved in bankruptcy proceedings and purchase the assets of that company without picking up the potential products liability on those assets, then there are at least many situations where it wouldn't occur and the bankruptcy would be a chapter 7 state [sic] bankruptcy liquidation.

App. e-4.

Allowing sales free and clear of claims also serves to preserve the expectations of the purchaser who relied upon the order of a federal court. This reliance and the finality that underlies it was the basis of a recent decision by the Seventh Circuit Court of Appeals. In re Edwards, 962 F.2d 641 (7th Cir. 1992). In Edwards, property of a bankruptcy debtor had been sold free and clear of all liens. A creditor holding a second lien against the property did not receive notice of the sale. The creditor argued that, despite the court order approving the sale free and clear of all liens, its lien survived because it had received no notice of the sale.

The Seventh Circuit Court of Appeals recognized the constitutional merits of the creditor's argument that a property

right cannot be destroyed or altered without notice. The court concluded, however, that the need to protect one who purchases assets in a bankruptcy court approved sale overrode the creditor's constitutional claim:

> To take away a person's property - and a lien is property - without compensation or even notice is pretty shocking, but we have property rights on both sides of the question here, since [the creditor] wants to take away property that [the purchaser] bought . . . As we said before, the liquidation of bankruptcy estates will be impeded if a bona fide purchaser cannot obtain good title, and creditors will suffer. The strong policy of bankruptcy sales embodied in Section 363(m) provides, in turn, strong support for the principle that a bona fide purchaser at a bankruptcy sale gets good title. . . .

962 F.2d at 645.

A bankruptcy court is, therefore, not precluded from protecting a *bona fide* purchaser, such as Allied Products, merely because the claimants lacked notice:

> The purpose of notice to creditors and other parties-in-interest when bankruptcy assets are to be sold, is to insure that the sales price is fair and that the funds flowing into the bankrupt estate for distribution among creditors or for other purposes are the most that could be realized from the assets sold.

In re Paris Indus. Corp., 132 B.R. 504, 509 (D. Me. 1991). These goals were met, as set forth in the detailed findings of fact by the bankruptcy court. App. f-3-9.

The facts in the Paris case were parallel to those in the instant case, because the claimants had received no notice and the accident had not yet occurred. Nonetheless, the Paris court found that the claimants had lost nothing by virtue of the sale. In fact, the Paris claimants still had their claim against the estate, regardless of the sale:

> As the Third Circuit has observed, the notice argument "primarily provides a justification for permitting [a claimant] to file a late proof of claim with the bankruptcy court or to avoid the discharge . . . rather than a justification for imposing successor liability on [the asset purchaser]."

132 B.R. 504, 510 n. 13 (quoting Conway v. White Trucks, 885 F.2d 90, 96 (3d Cir. 1989)). It is undisputed by the parties that the White Farm bankruptcy proceeding is still pending. App. a-3.

Significantly, the Paris court remarked: "The irony of [the claimants'] argument is that they would not even be able to make their claim against [the purchaser] were it not for the sale, for it is only by the sale of assets and the doctrine of successor liability that they can even assert such a claim." 132 B.R. 504, 510. As in Paris, the instant case is about responsibility. The effect of the bankruptcy court's order was to decree that with respect to any future claims that may arise out allegedly defective products manufactured and sold by the debtor prior to October 1985, such claims may not be asserted against the purchaser -- who until the purchase is a stranger, who but for the alleged purchase would remain a stranger, and who would not become a purchaser without the insulation which the court's order provides him -- but can only be made against the actual responsible party, the debtor. *See* App. a-4. The sale of assets did not extinguish or otherwise affect the rights of the plaintiffs to pursue their claims against the

debtor. The only effect of the court-approved sale of assets to Allied Products is to preclude the plaintiffs from seeking to impose responsibility upon Allied Products for the alleged torts of White Farm.

II. Federal Courts Are In Conflict Over Whether A Bankruptcy Court Can Discharge A Debtor From Unmatured Claims.

Assuming the Michigan Court of Appeals correctly framed the issue, the court erred when it held that a United States Bankruptcy Court could not discharge a debtor from an unmatured claim. Although the treatment of unmatured claims in the discharge of a debtor has polarized the federal courts of appeals, the weight of authority supports the ability of federal bankruptcy courts to discharge a debtor of unmatured claims. *Compare* In re Chateaugay Corp. ("LTV"), 112 B.R. 513 (Bankr. S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991); In re Amatex Corp., 755 F.2d 1034 (3d Cir. 1985); Grady v. A.H. Robins Co., Inc. (In re A.H. Robins Co.), 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd other grounds*, 839 F.2d 198, 199 (4th Cir.), *cert. dismissed sub nom.*, Joynes v. A.H. Robins Inc., 487 U.S. 1260 (1988)[6] *with* Schweitzer v. Consolidated Rail Corp. (In re Central R. Co. of New Jersey), 758 F.2d 936, 944 (3d Cir.), *cert. denied sub nom.*, Reading Co. v. Schweitzer, 474 U.S. 864 (1985); Mooney Aircraft Corp. v. Foster (In re Mooney Aircraft, Inc.), 730 F.2d 367 (5th Cir. 1984).[7] This conflicting interpretation of the Bankruptcy Code is an important and recurring question of federal bankruptcy law that this Court should resolve. *See* In re U.N.R. Industries, Inc., 29 B.R. 741,

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[6] *Accord* Roach v. Edge (In re Edge), 60 B.R. 690 (M.D. Tenn. 1986); In re Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986); In re Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y.), *appeal denied*, 39 B.R. 234 (D.C.N.Y. 1984).

[7] *See* Pettibone Corp. v. Ramirez (In re Pettibone Corp.), 90 B.R. 918 (Bankr. N.D. Ill. 1988).

745 (N.D. Ill. 1983), *appeal dismissed*, 725 F.2d 1111 (7th Cir. 1984), *on remand*, 46 B.R. 671 (Bankr. N.D. Ill. 1985).

The Michigan Court of Appeals held that because the reorganization plan was confirmed before the time plaintiffs' claims arose, the bankruptcy court did not have jurisdiction to discharge those claims under 11 U.S.C. § 1141(d). App. a-9-10. Section 1141(d) provides, in relevant part, that a bankruptcy court can discharge a "claim." The state court's narrow interpretation of the term "claim" in the federal Bankruptcy Code is in conflict with the plain language of the Code itself, a prior decision of this Court, as well as numerous decisions by the federal courts of appeals.

Previously, under the Bankruptcy Act, tort claimants were often unable to meet the provability requirement of showing the reasonable estimation or liquidation of their claim. Therefore, nonprovable claims were precluded from discharge and the claimant was able to pursue his claim after discharge. The current Bankruptcy Code, however, abolished the provability requirement and enacted §101(5)'s broad definition of "claim."[8] Based upon this broad mandate, which was ignored by the Michigan court of appeals, courts have recognized that a plaintiff's not-yet-discovered rights can exist even if unmatured under applicable state law at the time of the petition; thus plaintiffs' unmatured claim falls within the express language of § 101(5).

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8 Section 101(5) defines a claim as a--

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

Federal courts have broadly construed the definition of "claim" under the Bankruptcy Code in order to effectively address the problem of unmatured claims in discharge. See, e.g., In re Chateaugay, supra. The Supreme Court itself recently observed "it is apparent that Congress desired a broad definition of a 'claim' and knew how to limit the application . . . when it desired to do so." Ohio v. Kovacs, 469 U.S. 274, 279 (1985).

The courts have set forth a sound rationale to explain why unmatured claims such as plaintiffs' here, can be discharged by a bankruptcy court. First, under bankruptcy law rather than state law, the claim arises upon establishment of the relationship between the debtor and the creditor. Therefore, the claim actually arises based upon the debtor's conduct prior to the filing of the bankruptcy petition. For example, in In re Edge, 60 B.R. 690 (Bankr. M.D. Tenn. 1986), the court held that a claim arises at the earliest point in the relationship between the victim and the wrongdoer. Thus, plaintiff's claim for negligent dental services was recognized as a "claim" able to be discharged in bankruptcy, even though the negligence was undiscovered until after the petition was filed. The court explained that although the plaintiff's injury may not have manifested itself until post-petition, with no prior right of access to the state courts, for bankruptcy purposes, the "right to payment" arises at the time of the negligent act. Here, as in Edge, the alleged negligent act occurred pre-petition with the alleged negligent manufacture, distribution or sale of an allegedly defective 1973 product.[9] *Accord* In re Johns-Manville Corp., 57 B.R. 680 (Bankr. S.D.N.Y. 1986), (finding the operative time for determining a "claim" to be the pre-petition sale of defective goods by Johns-Manville to the creditors); In In

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[9] The court in In re Pettibone Corp., 90 B.R. 918 (Bankr. N.D. Ill. 1988), distinguished itself from cases, such as the instant one, where "there was some pre-bankruptcy privity, contact, impact, or hidden harm to the ultimately injured plaintiff or indemnity claimant." Id. at 931. Unlike plaintiff here, the plaintiff in In re Pettibone had no such pre-bankruptcy contact.

re A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd other grounds*, 839 F.2d 198, 199 (4th Cir. 1988) (holding that the right to payment arose when the Dalkon Shield was inserted into claimant, although the injury did not manifest until post-petition); In re Chateaugay Corp. ("LTV"), 112 B.R. 513 (Bankr. S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991) (holding the prepetition triggering event, (i.e. the threatened release of hazardous waste) caused the environmental claim to arise even though the injury occurred post-petition).

Some courts, such as the Fifth Circuit in In re Mooney Aircraft, Inc., 730 F.2d 367 (5th Cir. 1984), have declined to recognize a "claim" in advance of some manifestation of injury.[10] The Michigan court of appeals relied on the Mooney decision in reaching the surprising conclusion that a federal bankruptcy court did not have jurisdiction in a Chapter 11 proceeding to discharge the debtor of certain products liability claims even though the product at issue was manufactured over ten years prior to the court authorized sale.

The state court's heavy reliance on Mooney is misplaced. The Mooney decision was concerned with a liquidation sale under Chapter 7 of the Bankruptcy Act of July 1, 1898, entailing a procedure whereby the money is collected and promptly distributed to known creditors who have filed claims. As a Third Circuit court pointed out, "Mooney did not address the issue of claims under the current code nor a court's authority to effect a discharge in Chapter 11 reorganization which provides a debtor and a court the opportunity to make provisions for unknown creditors and unknown claims." Conway v. White Trucks, 692 F.

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10 See Schweitzer v. Consolidated Rail Corp. (In re Central R. Co. of New Jersey), 758 F.2d 936, 944 (3d Cir. 1985) (plaintiffs' future F.E.L.A. claims based on asbestos exposure were not dischargeable claims under Section 77); Pettibone Corp. v. Ramirez (In Re Pettibone Corp.), 90 B.R. 918 (Bankr. N.D. Ill. 1988) (under non bankruptcy law, the cause of action did not exist until injury occurred).

Supp. 442, 454 (M.D. Pa. 1988), *aff'd*, 885 F.2d 90 (3d Cir. 1989).[11]

The Michigan Court of Appeals ignored the plain language of the current Bankruptcy Code, failed to address the recent decision by this Court in Kovacs, misconstrued the applicability of Mooney, and ignored relevant federal courts of appeals' decisions.

III. The Supremacy Clause Of The United States Constitution Prohibits Imposition Of State Successor Liability Law Upon A Purchaser Of A Bankrupt's Assets When A United States Bankruptcy Court Has Ordered That The Purchaser Takes Such Assets Free And Clear Of Unmatured Claims.

Plaintiffs' collateral action is a direct challenge to the bankruptcy court's 1985 order, in which the court barred products liability actions such as this one against Allied Products. The bankruptcy court had clear core jurisdiction over such actions affecting the bankrupt's estate. App. f-9. Not only will the collateral challenge affect potential sales of assets in all estates arising in bankruptcy and erode the ability of trustees and debtors-in-possession to sell estate assets, it may arguably provide Allied Products with grounds for seeking rescission of the 1985 sale, having bargained for a sale free and clear of liability. *Accord* In re Paris Industries, 132 B.R. at 507. By allowing such a collateral attack, the Michigan Court of Appeals is acting contrary to the United States Bankruptcy Code and federal court decisions.

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[11] The Ninth Circuit Court of Appeals has also counseled against such misplaced reliance on Mooney. See Nelson v. Tiffany Industries, Inc., 778 F.2d 533, 537 n.7 (9th Cir. 1985).

The Bankruptcy Court for the Northern District of Illinois specifically found in its 1985 order that it had jurisdiction. In its conclusions of law it found that:

> This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(M).
>
> This court has jurisdiction to authorize consummation of the Allied Products acquisition transaction pursuant to 28 U.S.C. §§ 1334(a), 1334(d) and 157(a).
>
> This court has specific statutory authority to authorize consummation of the Allied Products acquisition transaction pursuant to 11 U.S.C. §§ 105(a), 363(b) and 363(f).

App. f-9. This jurisdiction extended to any or all proceedings "arising in or related to" the White Farm bankruptcy case under Title 11. 28 U.S.C. § 157(a). The "related to" language has been read as incorporating any proceeding whose outcome "could conceivably have any effect on the estate being administered in bankruptcy." In re Marcus Hook Development Park, Inc., 943 F.2d 261, 264-68 (3d Cir. 1991); In re Paris Indus. Corp., 132 B.R. 504, 507-08 (D. Me. 1991); In re Korhumel Industries Inc., 103 B.R. 917, 920-24 (N.D. Ill. 1989); 1 Collier on Bankruptcy ¶ 3.01 at 3-28 (1991). Thus, the Bankruptcy Court had jurisdiction over related matters including any claim against a purchaser of the bankrupt's assets based on activities of the bankrupt. See Julian v. Central Trust Co., 193 U.S. 93 (1904).

As the court of appeals recognized below, the bankruptcy proceeding is still pending. App. a-3. The bankruptcy court ordered that it would retain jurisdiction to "interpret and enforce the terms and provisions of [its] Order. . ." App. f-13. Thus, any

state court decision disturbing the bankruptcy court's prior order is a collateral attack.

Moreover, even assuming, arguendo, that the bankruptcy court did not have jurisdiction, this collateral attack in the Michigan state courts is wholly improper. It is well-settled that a court that issued an order in excess of its jurisdiction had jurisdiction to determine jurisdiction, and its jurisdictional finding, even if erroneous, is therefore good against collateral attack, like any other erroneous, but final, judgment. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377 (1939); Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939); Stoll v. Gottlieb, 305 U.S. 165 (1938); In re Edwards, 962 F.2d 641, 644 (7th Cir. 1992); *see* Dooley v. Weil *(In Re Garfinkle)*, 672 F.2d 1340, 1348 (11th Cir. 1982).

Thus, with the bankruptcy proceeding still pending, the appropriate court to address the bankruptcy issue here would be the United States Bankruptcy Court for the Northern District of Illinois which would be subject to direct review. A collateral attack in a state court erroneously limits the legitimate jurisdiction of the bankruptcy court and inappropriately questions the detailed findings of a federal court order.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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